IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-930

DIXY LEE RAY, Governor of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; JOHN C. HEWITT, Chairman, and HARRY A. GREENWOOD, BENJAMIN W. JOYCE, PHILIP H. LUTHER, and J. Q. PAULL, Members, Board of Pilotage Commissioners; DAVID S. MCEACHRAN, Whatcom County Prosecuting Attorney; CHRISTOPHER T. BAYLEY, King County Prosecuting Attorney; COALITION AGAINST OIL POLLUTION; NATIONAL WILDLIFE FEDERATION; SIERRA CLUB; and ENVIRONMENTAL DEFENSE FUND, INC.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, and SEATRAIN LINES, INC.,

Appellees.

REPLY BRIEF OF APPELLANTS

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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REPLY BRIEF OF APPELLANTS

I.

INTRODUCTION

Chapter 125 is a police power exercise designed to accommodate competing uses of Puget Sound and protect its natural resources from the risks of oil spills. Chapter 125 reduces those risks through its operative restrictions on oil tanker traffic in the confines of Puget Sound—a tug escort requirement and an access limit based on tanker size—without reducing the amount of oil processed in Washington. (A. 68). Chapter 125's objective of protecting the State's most valuable and sensitive estuary furthers the expressly stated congressional objective in the Ports and Waterways Safety Act ("PWSA") of pro-

tecting marine environments from destruction by oil spills.

The basic issue in this case is whether Congress in the PWSA clearly manifested an intention to forbid Washington State from enacting consistent, complementary legislation such as Chapter 125.

A. **The Federal And State Governments Are Pursuing The Same Objective—Protection Of Puget Sound.**

Chapter 125 applies only to that portion of Washington's marine waters identified as Puget Sound. Both the State and Congress have expressly recognized Puget Sound as a fragile and important estuary requiring special protection from the hazards of oil tanker traffic. In S. 1522 (amending Section 102 of the Marine Mammal Protection Act, 16 U.S.C. § 1372), 95th Cong., 1st Sess. (1977), which bans federal action that would increase the volume of crude oil handled at on-shore facilities on Puget Sound and which was signed by President Carter on October 18, 1977, Congress found:

> (1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;
> (2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and
> (3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

Section 5(a). (S. 1522, Section 5, is reproduced in Appendix A to this reply brief.)

Senator Magnuson, the prime sponsor of S. 1522, specifically indicated that it was intended as a "clear federal endorsement" of the *State* policy of protecting Puget Sound from tanker traffic hazards. 123 Cong. Rec. 16228 (daily ed. October 4, 1977). Where the federal and State governments are working in complete harmony to reach the common goal of protecting a "major national environmental treasure," *id.*, there is no basis to find congressional preemption of State efforts to achieve that goal.

B. **The Solicitor General's Position Substantially Supports The Validity Of Chapter 125.**

In his brief, the Solicitor General correctly acknowledges that "Chapter 125 represents an exercise by the State of Washington of its police power." (U.S. Br. 10). The Solicitor General properly concludes that the PWSA neither expressly nor implicitly preempts the tug escort provision of Chapter 125. However, the Solicitor General concludes that Chapter 125's access limit is invalid primarily on the basis of an issue never raised in the lower court and not properly raised now before this Court, i.e., his contention that the 125,000 DWT limit has not been shown to be reasonably related to the State's purpose of preventing pollution from oil spills. He in effect asks the Court to second-guess the State legislature, which this Court has repeatedly refused

to do.[1] This new argument is discussed at pages 23 to 25, *infra*.

C. ARCO Incorrectly Concludes That Chapter 125 is Preempted.

While ARCO does claim that the PWSA expressly preempts Chapter 125, ARCO's primary argument is a theory of implied preemption based upon allegations that (1) national uniformity is needed; (2) the field has been occupied by the Coast Guard; and (3) federally licensed ships are immune from state regulation.

ARCO asks this Court to deviate from its traditional approach in preemption cases of reconciling the operation of state and federal statutory schemes rather than ousting state regulation. ARCO urges the Court to construe Chapter 125 as conflicting with the PWSA and Coast Guard regulations promulgated thereunder when experience confirms that no conflict exists. It is uncontested that since the effective date of Chapter 125 in September of 1975, all oil tankers on Puget Sound have complied with both Chapter 125 and all federal regulations without any conflict or other problem whatsoever.

In addition, ARCO's brief fails to distinguish the two operative provisions of Chapter 125 from

[1] The position of the United States as reflected in the Solicitor General's brief is changed markedly from the position presented to the district court in the amicus brief prepared by the San Francisco office, Admiralty and Shipping Section, U.S. Department of Justice. Unlike the U.S. position in the lower court, the Solicitor General finds the tug escort provision valid and concludes that Congress did not expressly preempt Washington's access limit. Further, the Solicitor General does not find that Congress mandated exclusive federal regulation through the Coast Guard.

tanker design features. ARCO asks the Court to construe Chapter 125 as an attempt by the State to mandate tanker design standards. This claim ignores the fact that in the more than two years since Chapter 125 went into effect, *no* tanker has been kept out of Washington State waters because of any supposed design or equipment requirements.

II.

CONGRESS DID NOT EXPRESSLY PREEMPT CHAPTER 125.

ARCO argues that Title I of the PWSA, through Section 102(b), expressly preempts all state regulations relating to oil tanker movement, including Chapter 125. Such a reading of Section 102(b) is unwarranted. Neither the district court nor the Solicitor General found any express preemption of Chapter 125 through Section 102(b) or any other section of the PWSA. The clear and unequivocal declaration of exclusive federal authority which is required to preempt state regulation is not present in this case.[2] *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[2] In fact, the portion of Section 102(b) relied upon by ARCO is an express preservation of state authority; it does not expressly prohibit any state activity. Consequently, ARCO is forced to attribute a negative inference to language in Section 102(b). ARCO attempts to bolster this attenuated argument by use of an ambiguous statement in the House Report (quoted at Brief of Appellants 39) and by pointing to several isolated statements by speakers at the House Hearings (ARCO Br. 20). Examination of the Report and these comments reveals concern about state regulation of vessel *equipment* items, which are not requirements of Chapter 125.

ARCO's additional claim that Title II demonstrates preemptive intent is clearly wrong. Title II deals only with design and construction standards, contains no reference to preemption, and only authorizes the Coast Guard to set "minimum standards."[3] PWSA Section 201.

III.
CONGRESS DID NOT IMPLICITLY PREEMPT CHAPTER 125.

A. The Regulation Of Local Tanker Traffic Does Not Require National Uniformity.

ARCO's most emphasized argument is that state legislation such as Chapter 125 cannot stand because it runs afoul of a claimed need for nationally uniform regulation of tankers. However, since resolution of preemption claims involves the "sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties,"[4] this case cannot be resolved on the basis of a general or abstract "uniformity" claim. ARCO's

[3] ARCO's suggestion that "minimum standards" as used in Title II signifies congressional intent to allow the shipping industry to set higher environmental or safety construction standards is totally unsupported. (ARCO Br. 24-25). The PWSA was a response to the complete failure of the shipping industry to adopt any environmental measures. The evidence before Congress was undisputed that ships were being "built exclusively for the economic benefit of their owners" without regard for the environment, and Congress recognized that "much needs to be done" to remedy this situation. S. Rep. No. 92-724, 92d Cong., 2d Sess., 17 (1972) ("PWSA Senate Report"). Even the Coast Guard was unable to cite a single example of an environmental regulation promulgated by the American Bureau of Shipping, the group which promulgates industry standards. *Hearings on Navigable Waters Safety and Environmental Quality Act Before the Senate Commerce Committee*, 92d Cong., 1st Sess., ser. 92-39 at 39-41 (1971). Congress knew it could not rely upon the industry to set any standards exceeding the mandated "minimum standards."

[4] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

uniformity argument fails because it does not examine the particular statutory provisions and problems involved.

1. Chapter 125 does not require design or construction standards.

In its effort to argue a need for national uniformity, ARCO is compelled to mischaracterize Chapter 125 as imposing design or construction standards.[5] ARCO argues that Chapter 125 is preempted because design and construction standards must be uniform on a national or even international basis. However, as the Solicitor General recognized (U.S. Br. 34), Chapter 125 does not impose any design or construction standards. And ARCO by its own conduct since enactment of Chapter 125 has recognized that no such standards are required.

2. Rules for local waters must be diverse.

The operative provisions of Chapter 125—tug escort and access limit—are the types of regulation which inherently must be tailored to diverse local conditions such as channel depth, width, tides, weather, and traffic. Congress itself recognized in the PWSA that national uniformity for tug escort or vessel size regulations would be inappropriate. PWSA Section 102(e); PWSA Senate Report at 33;

[5] ARCO also claims that Chapter 125's tug escort provision disrupts uniformity by "pressuring" tanker operators to incorporate Washington's alternative design features in their vessels. (ARCO Br. 32). As indicated in the record (A. 62, 67) and pointed out by the Solicitor General, the cost of tugs is so small compared to the cost of incorporating design features that there is no economic pressure to adopt those features. (U.S. Br. 36-37). For example, the Solicitor General notes that ARCO could pay tug fees for 50 years and still have paid only one-third of the cost of incorporating the design features into just one vessel. (U.S. Br. 36, n. 37).

H. R. Rep. No. 92-563, 92nd Cong., 1st Sess., 8 ("PWSA House Report"). Any variation in tug escort requirements or access limits between coastal states due to natural geographic or other local factors cannot be characterized as legislative "Balkanization." (ARCO Br. 46-47).

3. **The Coast Guard is not the exclusive decision-maker for these diverse rules.**

Although ARCO suggests that nationally uniform regulation is needed for tugs and tanker size to avoid the "probability of proliferating state regulation" and "Balkanization" (ARCO Br. 47),[6] ARCO elsewhere in its brief concedes that tugs and access limits cannot be the subject of uniform rules. (ARCO Br. 30, 34-35). Ultimately, ARCO contends that Congress, through the PWSA, intended to transfer to the Coast Guard the authority to make the rules for all local waters and environments threatened by oil pollution from tankers, even though those rules would necessarily be different in each locality. Thus ARCO's claimed need for uniformity is not based on a concern for uniform substantive regulation of tug escorts or size limits but rather on a belief that only one agency should have authority to issue such regulations. (ARCO Br. 46-48). ARCO's position is inconsistent with more than one hundred years of state regulation and the express language of PWSA and other federal statutes.

[6] Contrary to ARCO's "Balkanization" claim, Alaska's tanker law does not "encourage rather than prohibit use of tankers over 125,000 DWT" (ARCO Br. 7-8). The only size related requirement of Alaska Stat. 30.20.010 *et seq.* (Supp. 1976) is the same as Chapter 125, i.e. tankers over 40,000 DWT must utilize tug escorts.

a. **State police powers include regulation of vessel movement.**

ARCO's first "uniformity" argument in support of its claim that only the Coast Guard should regulate vessel movement is that states have never had an historic police power role over the matter and that the field has always been regulated uniformly by the federal government. (ARCO Br. 40). As recognized by the Solicitor General, such a view is unfounded. (U.S. Br. 10). For example, he states:

> "The power to prescribe tug escort requirements is one traditionally within the competence of the states." (U.S. Br. 32)

As early as *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), state police power over navigable waters and vessel movement has been recognized.[7] Locally imposed tug escort requirements for vessels over a specified size and in specified areas have been upheld as a "needful and inherent" police power exercise. *Canada Atlantic Transit Co. v. Chicago*, 210 Fed. 7, 11 (7th Cir. 1913). There currently exists "massive legislation dealing with shipping matters" at the state level. Gilmore and Black, *Law of Admiralty*, 47-48 (2d ed. 1975). Coast Guard Commandant Bender acknowledged the shared federal-state control over vessels during hearings on the PWSA.

> The primary concern for the *safeguarding* of waterfront facilities and *vessels has been and continues to be a matter of local concern*. This

[7] Brief of Appellants at 24-26 more fully discusses historic police power control of vessels, including the more recent cases of *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960); and *Kelly v. Washington*, 302 U.S. 1 (1937).

legislation will in no way affect that primary responsibility. (Emphasis added).[8]

Contrary to ARCO's assertion, Chapter 125 is not a state intrusion into an area of exclusive federal authority. Rather, Chapter 125 is an exercise of local police powers to protect natural resources from vessel congestion in a hazardous area.

b. **Congress did not intend to grant exclusive authority to the Coast Guard.**

ARCO also argues in support of its "uniformity" claim that any state regulation, even if not in conflict with federal regulation, "necessarily disrupts" Coast Guard regulation. (ARCO Br. 28-29). ARCO's contention is unsupported by the PWSA and contradicted by the Coast Guard itself.[9]

The PWSA's express purposes are to protect the marine environment and improve vessel safety.[10] Sections 101 and 201. Nowhere in the Act does Congress state that uniformity is a necessary, or even

[8] *Hearings on H.R. 17830, H.R. 18047, H.R. 15710 before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries, 91st Cong., 2nd Sess., ser. 91-34* at 17-18 (1970).

[9] ARCO attempts to compare the Coast Guard duties under the PWSA to the roles of the Federal Aviation Administration and the Atomic Energy Commission in order to rely on *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972). Such reliance is misplaced. Both the FAA and the AEC by express statutory declaration had the competing, perhaps conflicting, responsibilities to promote an industry as well as regulate it. The Coast Guard has no such balancing responsibility. See Brief of Appellants at 43, n. 51, and at 56-57.

ARCO's citation to the Merchant Marine Act of 1970 as support for a Coast Guard role to promote the shipping industry is in error. (ARCO Br. 29, n. 29). The Maritime Administration, not the Coast Guard, is charged with promotion of the country's shipping industry.

[10] Congress underscored the "duty to place the protection of our environment above all other considerations" in authorizing the imposition of vessel requirements in Title II. 118 Cong. Rec. 22985, Introduction of Conference Report on H.R. 8140 in House, remarks by Congressman Pelly, June 28, 1972.

desirable, national purpose. Indeed, the word "uniform" never appears in the PWSA. *Cf. Campbell v. Hussey*, 368 U.S. 297 (1961).[11] Rather, Congress in the PWSA granted discretionary authority to the Coast Guard which, even if exercised, contemplated a continuing local activity. Section 102(e) specifically directs the Coast Guard, when determining the *need* for Coast Guard regulation, to consider existing local vessel traffic systems. Congress could not have intended that the Coast Guard be the exclusive regulator when Section 102(e) specifically contemplates the continued use of existing local systems.[12]

In addition, the Coast Guard does not regard itself as the sole agency with authority to regulate tanker traffic. Coast Guard Admiral Siler, as head of the agency responsible for administration of the PWSA, advised Congress this year:

> *If the state wished* to add on to the existing federal standard, rather than to conflict with it, say *to require the use of tugs to address some particular local risks*, and if that standard did not impede innocent passage, *then the Coast*

[11] In *Campbell*, the Court found preemption under the Federal Tobacco Inspection Act, 7 U.S.C. § 511, where Congress expressly declared its purpose that "uniform standards * * * [are] imperative" and that the standards adopted by the federal agency shall be "the official standards of the United States. * * *" *Id.* at 299. No such statement of purpose is either expressly stated in or fairly inferred from the PWSA or its legislative history.

[12] As pointed out in Brief of Appellants at 38, at least ten local vessel traffic systems were in operation prior to the PWSA. The Coast Guard has not established any federal vessel traffic systems in most of these ports. ARCO's argument that only the Coast Guard can regulate would require dismantling these safety systems without even attempting to replace them.

Guard would support that action. (Emphasis added).[13]

The Coast Guard's own statement refutes the notion that any additional state regulation necessarily disrupts Coast Guard regulation.[14]

c. **The Coastal Zone Management Act process, as implemented in Washington, confirms state authority to address oil tanker movement in coastal waters.**

The Coastal Zone Management Act of 1972, 16 U.S.C.A. §§ 1451 *et seq.* ("CZMA") further rebuts ARCO's contention that a national policy of uniformity is dictated for regulation of the nation's coastal waters. Congress has established through the CZMA a joint federal-state mechanism which allows coastal states to develop comprehensive "management programs" tailored to their particular demands and needs for the regulation of all uses within the coastal zone. 16 U.S.C.A. §§ 1453 (11) and (16), 1454(b).[15]

[13] *Hearings on Recent Tanker Accidents Before the Senate Commerce Committee*, 95th Cong., 1st Sess., ser. 95-4, 463 (1977). ("*Tanker Accident Hearings*").

[14] ARCO's claim that Admiral Siler's statement is "ambiguous" is wishful thinking. (ARCO Br. 36). Admiral Siler indicated both that tugs were appropriate responses to local conditions and that they could be required by states without disrupting any uniformity through exclusive Coast Guard regulation.

[15] In explaining the CZMA legislation to the Senate Committee on Commerce, then chairman of the Council on Environmental Quality, Russell Train, stated:

> [W]e do not try to tell a state that "your plan must conform to what your neighbor does." We think that would be an interference with the state prerogatives.
>
> *Legislative History of the Coastal Zone Management Act of 1972, as amended*, at 106 (1976).

Contrary to ARCO's contention that there is a federal policy of uniformity under present federal statutes, the CZMA fosters a policy of diversity, where necessary, to protect the nation's coastal waters from environmental harm.

Further, it should be noted that development and approval of state management programs must account for national as well as state interests. 16 U.S.C.A. §§ 1451; 1452; 1455(c)(1) and (8); 1456.

National policies for the state's coastal zone are established by federal approval of a state coastal management program.

The central feature of a state's program is the:

> definition of what shall constitute permissible land uses and *water uses* within the coastal zone. * * *

16 U.S.C.A. § 1454(b)(2). (Emphasis added).

The "coastal zone" extends "seaward to the outer limit of the United States territorial sea" and includes all of the waters of Puget Sound. 16 U.S.C.A. § 1453(1). The "water uses" in this zone subject to regulation through the program are defined broadly and include transportation of oil on the water:

> "Water use" means activities which are conducted in or on the water. * * *

16 U.S.C.A. § 1453(16).[16] "Transportation and navigation" are among the competing uses of the coastal zone expressly recognized by the CZMA as proper subjects of the state management program. 16 U.S.C.A. § 1451(c).

The application of the CZMA to Chapter 125 is direct. On June 1, 1976, then Secretary of Commerce Elliott Richardson approved the management program for the State of Washington. Ex. BBB. The approved program represents the national use regula-

[16] Congress invited states to play a strong role in addressing activities on the nation's coastal waters:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to *exercise their full authority over the* lands and *waters in the coastal zone.* * * * 16 U.S.C.A. § 1451(h). (Emphasis added).

tion—or zoning policy—for all coastal waters of the State including Puget Sound.[17]

Northern Puget Sound was singled out in the Washington program as an "area of particular concern" within the coastal zone due to oil tanker traffic. 16 U.S.C.A. § 1454(b)(3); Ex. AAA, 12, 17. The Washington program identified Chapter 125 as one of the "means by which the state proposes to exert control" over oil transportation on its waters.[18] The program states:

> In recognition of the potential impacts of Alaska North Slope Oil on Puget Sound and the Strait of Juan de Fuca, the Washington State Legislature has taken several steps to prepare for spill threats to the state's inland marine waters.
>
> * * *
>
> Further, the 1975 Legislature passed [Chapter 125], which provides for safety standards and prohibits tankers larger than 125,000 dead-

[17] Upon approval of state management programs, federal activities are to be conducted in accordance with the consistency provisions of the CZMA:

> (1) Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.
>
> * * *
>
> (3)(A) After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. * * * No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification. * * *

16 U.S.C.A. § 1456(c).

[18] The CZMA requires that states include in their management programs:

> (4) An *identification of the means by which the state proposes to exert control over* the land uses and *water uses* referred to in paragraph (2), *including a listing of relevant* constitutional provisions, *laws*, regulations, and judicial decisions.

16 U.S.C.A. § 1454(b)(4). (Emphasis added).

> weight tons from entering Puget Sound and the Strait of Juan de Fuca beyond a point east of the Dungeness Lighthouse. The prohibition is currently being appealed as unconstitutional by a major oil company.

Ex. AAA, 17-18.

Chapter 125 is, as a matter of law, part of the federally-approved coastal zone program for Washington.[19]

Appellants do not contend that the approval by the Secretary of Commerce of Chapter 125 in itself mandates a declaration of the statute's constitutionality. Appellants do contend, however, that the CZMA reveals a congressional intent to allow the State of Washington to protect its coastal resources in a manner which may differ from the management programs of other states. Further, the implemented CZMA program establishes a national policy of permitted uses for the waters of Washington's coastal zone. State policy is now federal policy.[20]

ARCO's claim that the PWSA or some obscure

[19] ARCO relies on an affidavit of Mr. Robert Knecht, a subordinate of the Secretary of Commerce, in contending that Chapter 125 is not part of Washington's approved coastal zone program. (ARCO Br. 44). Secretary of Commerce Elliott Richardson's "Certificate of Approval" for the Washington program (Ex. BBB) is an official statement of approval. The Certificate of Approval speaks for itself and cannot be contradicted by parol evidence. *White v. Federal Deposit Insurance Corp.*, 122 F.2d 770 (4th Cir. 1941), *cert. den.*, 316 U.S. 672 (1942).

Further, no state program can be submitted or approved unless it contains all state statutes regulating the identified competing uses of the coastal zone. Chapter 125 was a necessary element of the program approved by the Secretary of Commerce. 16 U.S.C.A. §§ 1454(b)(4); 1455(d).

[20] According to its prime sponsor, Senator Magnuson, S. 1522 (discussed *supra* at 2-3) was enacted to endorse Washington State's policy in its coastal zone management program of protecting Puget Sound from oil tanker traffic hazards and precluding location of oil transshipment facilities in Puget Sound. 123 Cong. Rec. 16228 (daily ed. Oct. 4, 1977).

national policy requires uniformity through exclusive Coast Guard regulation cannot be reconciled with the CZMA.[21]

B. **Chapter 125 Is Not Preempted By Coast Guard Implementation Of Tanker Regulations.**

ARCO also asserts that Chapter 125 is implicitly preempted because the Coast Guard "has fully implemented its regulatory powers" over all aspects of tanker safety, including Chapter 125's operative provisions of tug escort and access limit. (ARCO Br. 14).

This argument is based upon a misunderstanding of the doctrine of implied preemption. Preemption can be found only if Congress evidenced a "clear and manifest purpose" to make the PWSA the exclusive means of protecting local harbors from the risks of oil tanker movement. The actions of the Coast Guard alone cannot demonstrate congressional preemptive intent, as ARCO suggests. *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Furthermore, the Coast Guard has not implemented comprehensive regulations. Those regulations which have been adopted do not, as evidenced by two years of experience, conflict with the opera-

[21] ARCO argues that Chapter 125 upsets an exclusive "balancing" role for the Coast Guard under the PWSA. (ARCO Br. 28-29). To the contrary, the federal statute which establishes the mechanism for a balancing of all competing demands for use of the nation's coastal zone is the CZMA. The PWSA was never intended for such a role; it deals with regulation of only one of many uses in the nation's coastal waters.

tive provisions of Chapter 125.[22] As the Court pointed out in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973), resolution of the question of any conflict between state and Coast Guard Regulations "should await a concrete dispute" between the two.

ARCO's claim that the Coast Guard has "fully implemented" its power regarding tug escorts on Puget Sound is greatly exaggerated, based as it is on two isolated situations, neither involving oil tankers subject to Chapter 125.[23] ARCO's claim that the Coast Guard has established an access limit on Puget Sound is also unsupportable. [24] In fact, neither tug escorts nor access limits were even considered by the Coast Guard as part of the rule-making procedure establishing the vessel traffic system for Puget Sound.[25]

[22] Even assuming that Coast Guard regulations were to be extended far beyond their present limited scope, preemption is not to be inferred merely from "comprehensive" regulations. *New York Department of Social Services v. Dublino*, 413 U.S. 405, 415 (1973). *See* Brief of Appellants at 41-44.

[23] The Coast Guard District Commander has ordered liquefied petroleum gas (LPG) vessels to use tug escorts in Puget Sound, undoubtedly for the same important safety reasons Chapter 125 requires such escorts for oil tankers. The Coast Guard also ordered one disabled barge of unknown size to use a tug escort in an emergency. (ARCO Br. appendix at A-3, A-12). Based on this, ARCO argues in effect that states are preempted from sending tugs to assist vessels under any circumstances because the Coast Guard has done so in one case. (ARCO Br. 15).

[24] ARCO's statement that the Coast Guard in the Puget Sound vessel traffic system ("VTS") has established size regulations is a misrepresentation. (ARCO Br. 14, 30). There is no size or access regulation in the VTS, 33 C.F.R. Part 161, Subpart B (1974) (A. 141-153), or in any written rule or regulation. The Coast Guard Operating Manual (A. 155-198) simply encourages one-way traffic in Rosario Strait and contains no reference to size limits. (A. 184). Although the Pre-Trial Order states that the Coast Guard applies this informal one-way policy to tankers greater than 70,000 DWT (A. 65), this practice is not based on any written regulation and, in any event, is not a "size regulation" for Puget Sound.

[25] 38 Fed. Reg. 21227 (August 6, 1973); 33 C.F.R. Part 161 (1974); Public Docket, CGD 73-158 PH, Coast Guard Headquarters, Washington, D.C.

ARCO itself acknowledges that the Coast Guard has not promulgated general tug escort or vessel size regulations. (ARCO Br. 30, 36). Although on May 6, 1976, the Coast Guard solicited comments from the public on the general concept of tug escorts, the Coast Guard has not done anything to adopt regulations comparable to Chapter 125. 41 Fed. Reg. 18770. Over 15 months have elapsed since the last public comment on this matter, and the Coast Guard has made no public decision or statement, let alone proposed any regulations, on the subject.[26]

Conceding the Coast Guard has not acted on tug escorts and access limits for oil tankers on Puget Sound, ARCO ultimately argues that the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate." (ARCO Br. 30). ARCO's argument is without justification.

Significantly, ARCO does not cite any evidence that Congress intended that failure of the Coast Guard to act would be preemptive. As recognized by this Court and others, mere failure to act is not considered preemptive. *See, e.g., California v. Zook*, 336 U.S. 725 (1949); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939); *Chrysler Corp. v. Tofany*, 419 F.2d

[26] The Coast Guard is *not* "implementing" tug escorts "on a nationwide basis" as ARCO claims. (ARCO Br. 34). The May 6, 1976 notice was an "advance notice of proposed rulemaking" which solicited comments because the Coast Guard was "considering * * * *minimum* standards." (Emphasis added). ARCO's reference to 42 Fed. Reg. 5956 (January 31, 1977) as proof that rulemaking will occur "in the near future" is a misstatement. (ARCO Br. 15). Rather, 42 Fed. Reg. 5956 refers to the possibility of imposing various vessel *equipment requirements on tug boats themselves* and is unrelated to tug escorts for tankers.

499 (2d Cir. 1969).[27] Further, even express rejection by a federal agency may not preempt state authority. For example, in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), the Court found no preemption of state regulation even though the Secretary of Agriculture expressly rejected adoption of the specific standards adopted by the state. 373 U.S. at 141. Finally, ARCO's reliance upon *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), is misplaced. The actions of the NLRB in exercising its authority to hear cases cannot be compared with failure of the Coast Guard to adopt regulations; in *Bethlehem*, the NLRB had affirmatively established a policy that it would not exercise its jurisdiction in numerous identical cases. The Court specifically indicated that where the federal agency has failed to act, "the states are in those cases permitted to use their police power. * * *" 330 U.S. at 774.

In this case, the Coast Guard has not considered tug escorts or access limits for Puget Sound, much less made any affirmative determination that such regulations are inappropriate. More importantly, ARCO cannot show that Congress intended that, if

[27] Failure to act can be caused by many factors unrelated to the desirability or need for regulation. For example, the Coast Guard has not installed radar surveillance equipment for the Puget Sound VTS in Rosario Strait even though it believes such equipment is urgently needed and should be installed as soon as funds are available. *Hearings on Vessel Traffic Control before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 94th Congress, 1st Sess., ser. 94-39 (1975). ARCO's argument would lead to a conclusion that the Coast Guard's failure to install radar in Rosario Strait is a decision that radar is not necessary there, which plainly is not the case.

any such determination were ever made, it would be preemptive.

ARCO's claim that the Coast Guard has "fully implemented" its authority also overlooks the limited nature of Coast Guard regulation on Puget Sound. This regulation leaves room for consistent state laws. The Coast Guard's rudimentary traffic system for Puget Sound consists of separated traffic lanes in some areas and periodic radio reporting by vessels. (A. 156).[28] The recent case of *Beeson v. Atlantic-Richfield Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977), illustrates the failure of Coast Guard regulations to respond to all of the hazards presented by tanker traffic on Puget Sound. In *Beeson*, a commercial fisherman recovered damages when the ARCO tanker *Atlantic Endeavor*, while operating in the Coast Guard VTS, collided with the fishing equipment of at least three commercial fishing vessels at Rosario Strait.[29]

In sum, Chapter 125's tug escort requirements and access limit are intended to protect Puget Sound waters from the risks of oil spills and complement the

[28] There are no separated traffic lanes in the most dangerous areas, such as Rosario Strait, where the channel is so narrow that there is not room for two lanes. (A. 184).

Even ARCO has admitted that current Puget Sound VTS regulations are incomplete. *See* Statement of Charles M. Lynch, Vice President of Marine Transportation for ARCO, *Tanker Accident Hearings*, part 2 at 946 (1977).

[29] Even though the tanker was operating in the Coast Guard VTS and the "weather was clear, visibility was good, and there was adequate daylight," the tanker collided with equipment in both the north and south bound traffic lanes before managing to extricate itself from the area. 88 Wn.2d at 502, 563 P.2d at 824. Despite awareness of the presence of fishing vessels, the ARCO captain issued instructions to proceed and told the state pilot not to worry "because Arco would pay for any damage" (88 Wn.2d at 510, 563 P.2d at 828), an implicit rejection of his employer's "shallow pocket" argument put forward here. (ARCO Br. 39).

Coast Guard VTS in precisely the manner Congress contemplated in the PWSA.[30]

C. Chapter 125 Does Not Conflict With Federal Vessel Registration, Enrollment Or Licensing.

1. Chapter 125 is an even-handed environmental regulation.

ARCO and the Solicitor General contend that the 125,000 DWT access limit is an invalid restriction on federally enrolled and licensed vessels under the authority of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).[31] (ARCO Br. 52-53; U.S. Br. 38-39). However, *Gibbons* does not stand for the proposition that all state laws which restrict federal vessels are prohibited. That the possession of a federal license does not immunize a vessel from state regulation is well established. *See, e.g., Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 447 (1960); *Smith v. Maryland*, 59 U.S. (18 How.) 71

[30] As noted *supra* at 11-12, the Coast Guard has stated that it supports complementary state regulations such as tug escort requirements.

[31] ARCO also argues that Chapter 125 "effectively revokes" a certificate of inspection or compliance issued under the Tank Vessel Act. (ARCO Br. 51). ARCO overstates the nature of these certificates. The certification of tank vessels by the Coast Guard merely indicates that some of the vessel's equipment complies with marine inspection laws and regulations. 46 C.F.R. 31.01-1(a). As indicated in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), a federal certificate, like a federal license, does not exempt vessels from valid state and local environmental and health regulations.

ARCO and the Solicitor General also contend that Chapter 125's 125,000 DWT access limitation stands as an obstacle to the Maritime Administration's MARAD program promoting American shipbuilding. (ARCO Br. 55-56; U.S. Br. 42-43). This argument is without factual basis. Two-thirds of the tankers which have been constructed or are on order under the MARAD program are under 125,000 DWT. (A. 60). The use of these tankers is unaffected by the access limit. The smallest MARAD tankers over 125,000 DWT are 225,000 DWT vessels with a draft well in excess of 60 feet (A. 80), which substantially exceeds the controlling depth of Rosario Strait (A. 65) and all oil refinery docks on Puget Sound. (A. 47-48, 113).

(1855). This principle was recently repeated in *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740, 1747-48 (1977):

> States may impose upon federal licensees reasonable, non-discriminatory conservation and environmental protection measures otherwise within the state police power.

Chapter 125 is such a conservation and environmental measure.

ARCO's reliance on *Gibbons* is misplaced. *Gibbons* invalidated a system of discriminatory treatment created by a "monopoly law [which] allowed some steam vessels to ply their trade while excluding others that were federally licensed." *Douglas, supra*, at 1747.

Likewise, ARCO mistakenly relies on *Douglas*. The Court in *Douglas* struck down a state law which discriminated against non-resident federal licensees. The Court found that the state statute had no legitimate conservation purpose and in effect was an attempt at economic protection of its residents from out-of-state competition. [32] The Court held that 46 U.S.C. § 251, the principal section relied upon by ARCO, entitled federal licensees "to the same 'privileges' of fishery access as a State affords to its residents or citizens." *Id.* at 1750. It was within this context of discriminatory treatment that the Court stated, "no State may completely exclude federal licensed commerce."[33] *Id.* at 1751 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142).

[32] No challenge is made to the conservation and environmental purposes of Chapter 125, and no claim is made that Chapter 125 in any manner is an effort to suppress competition.

Since Chapter 125 does not distinguish, let alone discriminate, based on ownership or licensing status, it cannot be attacked as discriminatory.[34] Chapter 125 is an impartial, "[e]venhanded local regulation to effectuate a legitimate local public interest." *Huron, supra*, 362 U.S. at 443. *See also, Manchester v. Massachusetts*, 139 U.S. 240, 265 (1891).

2. The Solicitor General's claim that the access limit is not reasonably related to Chapter 125's objectives is unwarranted.

The Solicitor General recognized Chapter 125 as a police power exercise by the State of Washington (U.S. Br. 10) and found no preemption of the tug escort provision. (U.S. Br. 18). He argues, however, that the 125,000 DWT access limit is invalid because that limit "has not been shown to be

[33] Of course, federally licensed commerce may be excluded by valid police power regulation. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

[34] ARCO's suggestion that Chapter 125 may be discriminatory because it applies uniformly to both interstate and foreign tankers is incomprehensible. (ARCO Br. 53). Chapter 125 applies to all tankers, including intrastate vessels.

ARCO and the Solicitor General further suggest that Washington's access limit based on size may be invalid because it is based on the "characteristics of the vessel itself" (ARCO Br. 53) or because it applies to a "class" of vessels, i.e. those vessels over 125,000 DWT. (U.S. Br. 38). The legal theory for this is unclear and no citations are given. Vessel size is clearly a proper basis for regulation, as recognized by Congress in the PWSA. Sections 101(3)(iii) and 102(e). Similarly, this Court recognized the propriety of transportation regulation based on size. *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938). To the extent these claims are a disguised argument that the particular size chosen by the State legislature is not reasonable, this new issue is discussed in the following section.

reasonably related to the State's avowed purpose of protecting Pudget [sic] Sound from oil spills." (U.S. Br. 39).[35]

The reasonable relationship between the objectives of Chapter 125 and the means selected to achieve those objectives has never been challenged by ARCO. All parties entered into a lengthy Pre-Trial Order (A. 39-96) which framed the "issues of fact and law" and set forth the facts "agreed upon" for purposes of this litigation. The reasonableness of the access limit is neither a legal nor a factual issue in this case. See Pre-Trial Order, ¶s 119, 155-161. (¶s 155-161 are reproduced as Appendix B to this reply brief.) In addition, the district court did not consider the issue and the matter is not, therefore, appropriate for consideration by this Court. *See, e.g., Duignan v. United States*, 274 U.S. 195, 200 (1927).

Furthermore, the Solicitor General asks this Court to second-guess a state legislature, which the Court has repeatedly refused to do. As stated in *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976):

> [T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. * * *

See also Hughes v. Alexandria Scrap Corp., 426 U.S.

[35] By claiming that the size limit is unreasonable, (U.S. Br. 38-39), the Solicitor General attempts to avoid the principle repeated in *Douglas, supra*, that states may impose "reasonable, non-discriminatory" environmental measures on federally licensed vessels.

794, 812 (1976); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

Where, as here, a good faith dispute exists as to the efficacy of the 125,000 DWT access limit (A. 84), it is the legislature's role to resolve it.[36] For example, in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad*, 393 U.S. 129, 134-135 (1968), the railroads asked the Court "to determine as a judicial matter that [full crew] laws no longer make a significant contribution to safety." The Court there upheld the state's judgment on its law's safety benefits even though "[t]he evidence as to the need for firemen and other additional crewmen was certainly conflicting and to a considerable extent inconclusive." *Id.* at 136. The Court found that the district court, which concluded that the law had no substantial effect on safety and that any slight increase in safety was not worth the additional cost to the railroad, "indulged in a legislative judgment wholly beyond its limited authority." *Id* at 136.

[36] In any case, there is considerable support in the record for the 125,000 DWT limit in addition to ¶ 119 of the Pre-Trial Order. (A. 84). First, Alyeska Pipeline Service Company, owned in part by ARCO, told Congress that "the largest vessel to be used in the Valdez-Puget Sound trade will be 120,000 DWT." *PWSA Senate Hearings* at 415. Thus, the access limit accommodates what were stated to be the largest vessels which would enter Puget Sound with Alaskan oil. Second, the 125,000 DWT limit responds to topographic and other conditions of Puget Sound. For instance, five of the six refineries on Puget Sound cannot even dock a tanker greater than 125,000 DWT. (A. 47-48, 80). Rosario Strait, along the tanker route, is not only one of the narrowest shipping channels in Puget Sound, but also has a depth in portions of only 60 feet. (A. 65, Ex. G).

CONCLUSION

Based on the foregoing and on the Brief of the Appellants, we request that the Court reverse the decision below. Chapter 125, which helps to prevent the occurrence of disastrous oil spills and to preserve the special waters of Puget Sound, is an important and reasonable state measure of environmental protection which Congress has neither expressly nor implicitly preempted by the PWSA or by any other statute. Chapter 125 should be sustained.

DATE: October 21, 1977.

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APPENDIX A

S. 1522, Section 5 (Amending Section 102 of the Marine Mammal Protection Act. 16 U.S.C. § 1372), 95th Cong., 1st Sess. (1977).

(a) The Congress finds that—

(1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;

(2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and

(3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

(b) Notwithstanding any other provision of law, on and after the date of enactment of this section, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of

being handled at any such facility (measured as of the date of enactment of this section), other than oil to be refined for consumption in the State of Washington.

APPENDIX B

Section IV of Pre-Trial Order (Issues of Law, paragraphs 155-161)

IV. *ISSUES OF LAW*

155. Does the Eleventh Amendment to the United States Constitution preclude this Court's jurisdiction?

156. Does H.B. 527 invade a field of regulation which has been preempted by the federal government and thus violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2?

157. Does H.B. 527 impermissibly conflict with federal statutes and regulations and thus violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2?

158. Does H.B. 527 unduly burden interstate and foreign commerce, *i.e.*, does H.B. 527 impermissibly impede the free flow of interstate and foreign commerce and thus violate Article I, Section 8, Clause 3 of the United States Constitution?

159. Does H.B. 527 invade a field of regulation where national uniformity is essential and thus violate the interstate and foreign commerce clause, Article I, Section 8, Clause 3, of the United States Constitution?

160. Does H.B. 527 invade a field of regulation where international agreement and cooperation have primacy and thus impermissibly interfere with exclusive federal power to regulate foreign affairs, to

regulate foreign commerce (Article I, Section 8, Clause 3) and to make treaties (Article II, Section 2, Clause 2)?

16. Does H.B. 527 impermissibly conflict with international agreements to which the United States is a party and thus violate the Supremacy Clause of the United States Constitution, Article VI, Clause 2?